

OPINION
46-34

December 31, 1946 (OPINION)

CITIES

RE: Municipal Water Supplies - Right of Municipalities to Protect

This will acknowledge the receipt of your letter of December 26, 1946, together with a copy of a letter addressed to your under date of December 23, 1946, by Jay W. Bliss, city manager of Minot, North Dakota. Mr. Bliss inquires whether "there is any state law which would enable a city to protect its underground water supply, by refusing to permit the construction of other wells within the city limits, adjacent to those operated by the city, and which would of necessity, tap the same reservoir that the city draws from."

Under the provisions of subsection 61 of section 40-0501 of the 1943 Revised Code, a city has the power: "To prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of, the limits of the municipality."

Now, it may be that under this provision a city may by ordinance prohibit the construction of wells within the limits upon the theory that through such wells the city's water supply might become contaminated or polluted. If it could be definitely determined that the underground waters supplying the city wells of Minot flowing a definite stream or channel, then there would, in my opinion, be no question as to the right of the city to protect its water supply from appropriation or diversion through the construction of wells within the city limits. But if the waters flowing into the city's wells are merely underground waters which percolate or seep through the ground and collect in sand pockets or gravel beds, then a more serious legal question is presented. For section 47-0113 Revised Code provides:

"The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream formed by nature over or under the surface may be used by him as long as it remains there, but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, not pursue nor pollute the same."

The owner of land within the limits of a city has therefore a vested property right in the waters on or below the surface unless such waters are flowing in a definite stream. If flowing in a definite underground stream, his right to the use of the waters therein is analogous to the right of a riparian landowner to appropriate the waters of a stream flowing over the surface of the ground. Courts have held that a person may dig a well on his own land although he thereby cuts off his neighbor's water supply. *Mosier v. Caldwell*, 7 Nev. 363; *Dehli v. Yeomans*, 45 N.Y. 362. See note "Rights in Subterranean Waters," 19 L.R.A. 92, and cases cited therein.

But notwithstanding such court decisions, it is my opinion that a city has the right, under its police power, to protect its water supply. For it is obvious that the health, safety, and welfare of the people of a city are paramount and superior to the right of an individual landowner.

In order, however, for a municipality to protect its water supply, it may be necessary to acquire the rights of landowners to underground waters. Under the provisions of section 47-0113 of the 1943 Revised Code, a landowner has a vested property right in the waters below the surface unless such waters are flowing in a definite underground stream. If flowing in a definite stream, his right to appropriate the waters thereof is subject to the control of the Water Conservation Commission. It may be necessary to institute so-called condemnation proceedings in order to acquire the rights of landowners in their underground waters. Through such eminent domain proceedings, a city may acquire the ownership of, or at least the right to the use of, such waters. This, of course, implies that the landowners must be compensated.

It appears to me, Mr. Walsh, that a survey by the state geologist can readily determine the character of the underground waters supplying the Minot wells, and that upon his findings the city of Minot can take such measures as may be deemed necessary to protect its water supply.

NELS G. JOHNSON

Attorney General